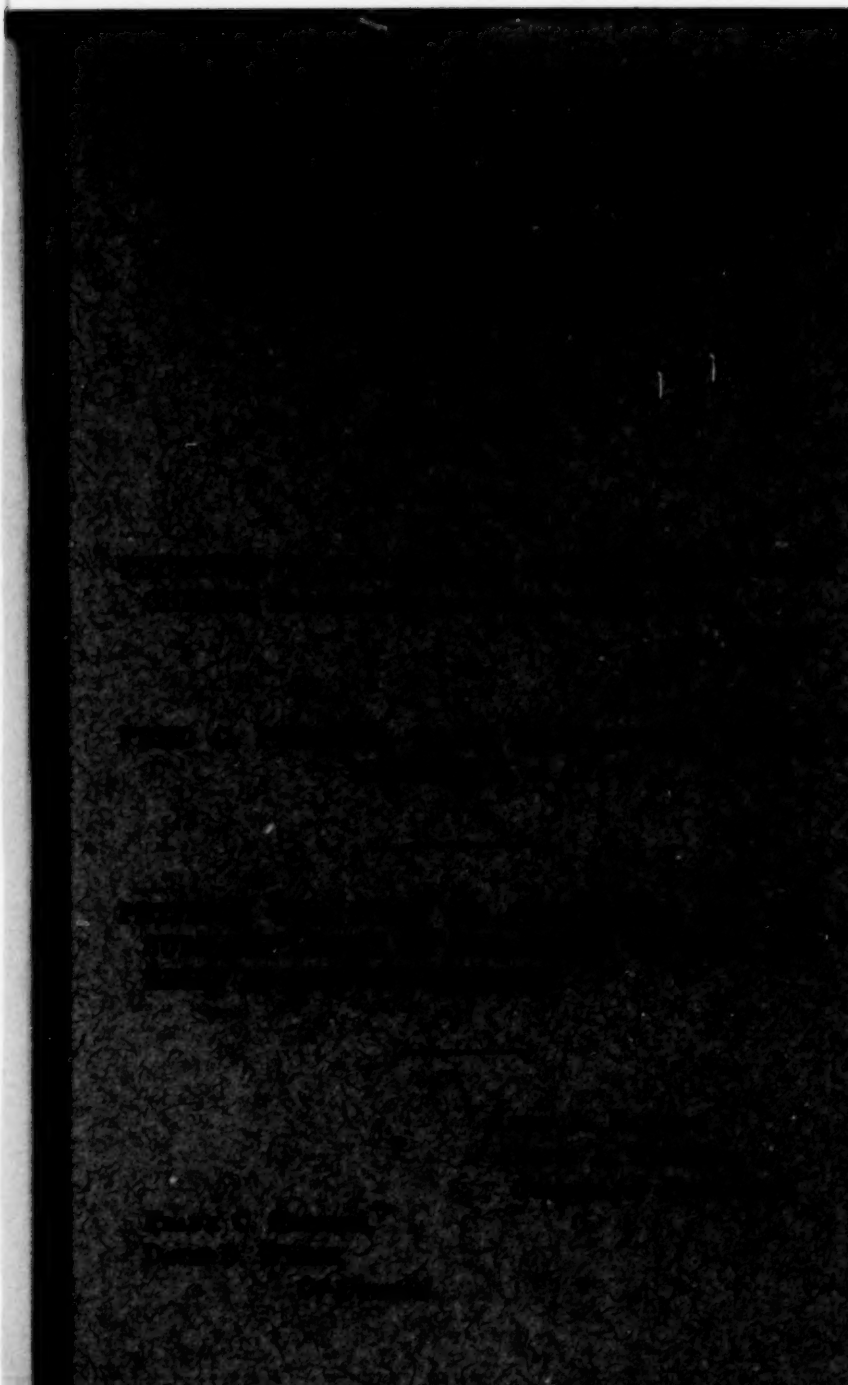

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 153

TRUSTEES OF THE MONROE AVENUE CHURCH OF CHRIST, INDIVIDUALLY AND COLLECTIVELY; THE MONROE AVENUE CHURCH OF CHRIST, A CORPORATION; AND LLOYD C. DICKERSON,

Petitioners,

vs.

FRED C. PERKINS, EARL McCULLOUGH, DRELL MURLETTE, G. P. MOHR, MILDRED MERCURIO AND MOLLEY E. VICE,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners respectfully pray that a writ of certiorari issue to review a judgment and order of the Supreme Court of the State of Ohio dismissing Petitioners' Appeal as of Right from the Court of Appeals of Franklin County, Ohio, and thereby affirming, in effect, a final judgment for the

Respondents, plaintiffs below, in the Common Pleas Court of Franklin County, Ohio.

A

Jurisdiction

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended (28 U. S. Code 344b).

The judgment sought to be reviewed was entered by the Supreme Court of the State of Ohio, the court of last resort in said State, on March 5, 1947 (R. 3), and Petitioners' Motion for a Rehearing was denied on the 26th day of March, 1947 (R. 3). The judgment of the Supreme Court of the State of Ohio is not reported officially. It appears in the record at page 3. The opinion of the Court of Appeals for Franklin County, Ohio is not reported officially, but is reported unofficially in 70 N. E. (2d) 487, and is also filed herein as a part of the record (R. 15-23).

Summary Statement of the Matter Involved

1. *Suit and the Parties thereto:*

This proceeding originated in the Court of Common Pleas of Franklin County, Ohio, and prayed for an order enjoining the defendants below, Petitioners here, from using or occupying the real property which had been purchased by the petitioning corporation (R. 57), from selling, leasing or otherwise disposing of said property to any person other than a member of the Caucasian race (R. 58), and to enjoin the Petitioner, Dickerson, or any other person than a member of the Caucasian race from occupying said property (R. 58).

The trial court found that the petitioner, Dickerson, the present occupant of the premises, and his family, are "the kind of persons usually known as colored" (R. 47), and is "part negro" (*sic*) (R. 34, 42).

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The trial court had previously found that the Monroe Avenue Church of Christ was a religious corporation not for profit duly organized under the laws of the State of Ohio (R. 34) and has a congregation "largely made up of (*sic*) colored people" but not exclusively so (R. 34).

Respondents here, the plaintiffs below, allege (R. 57) and the findings of both the trial and the appellate courts (R. 15, 34) demonstrate that the real party in interest in these proceedings, so far as Petitioners here and defendants below are concerned, is the Monroe Avenue Church of Christ, a non-profit corporation organized under the laws of Ohio. The defendant Trustees below, Petitioners here, have only a nominal interest. The Petitioner, Lloyd C. Dickerson, is a minister of the gospel, appointed by the corporate Petitioner and occupies the premises in dispute only as an officer, agent, servant, or employee of the corporate Petitioner as part compensation for his services to such corporate body (R. 42).

Prior to the present suit the corporate petitioner purchased, through the petitioning trustees, as agents, the improved parcel of residential property located in the City of Columbus, County of Franklin and State of Ohio, more fully described as No. 93 North Ohio Avenue, Columbus, Ohio (R. 42). The corporate petitioner is the owner of record title to the property in fee simple and occupied it for corporate purposes (R. 42). Petitioner Dickerson occupies the property only as an employee of the corporate petitioner (R. 42).

In this action Respondents sought an injunction restraining Petitioners from holding, occupying or using the premises in question. Respondents obtained a decree below requiring Petitioners to abstain from use or occupancy of the said premises by the Petitioner Dickerson or by any other person not of the Caucasian race and from violation of a

race restrictive covenant upon said property, which said covenant is fully set forth herein in the Record at Pages 16, 17.

2. *Theory and Factual Basis of the Suit*

There is no dispute as to the essential facts (See Stipulations (R. 59). On or about January 15, 1926, Paul Scofield, predecessor in title of the corporate petitioner, together with approximately 28 other residents of the same block of North Ohio Avenue between Long and Broad Streets in Columbus, Ohio, executed a certain agreement, the pertinent parts of which are as follows:

> "Said grantee, as a part of the consideration for this conveyance, and for the mutual benefit of all of the owners of the lots on the east and west sides of North Ohio Avenue, between the first alley north of East Broad Street and the first alley south of East Long Street, and of every other present and subsequent owner of a lot or lots in the territory above described for himself and his heirs, hereby covenants and agrees with the said grantor herein, its successors and assigns, that at no time prior to January 1, 1960, shall any lot or part of a lot, or interest in any of the premises located on Ohio Avenue, as aforesaid, be leased, rented, sold or conveyed to any person or persons of any race other than Caucasian, nor shall any such person or persons other than Caucasian be permitted to occupy the same during that period, *except as a servant of the occupant of any of the said premises.*" (Italics ours.)
>
> "And it is expressly agreed that if said grantee, his heirs, executors, administrators or assigns, or anyone holding or claiming by, through or under any of them, shall violate this condition, then these presents and this conveyance shall become null and void, and all the right, title, interest and estate in said premises shall immediately revert to and be reinvested in the grantor hereof, its successors and assigns, and it shall be seized as of its former estate herein as if these presents had

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never been executed, and may immediately re-enter, re-possess and hold said premises as of a good estate in fee simple, and the grantor hereof hereby gives and grants to the present owners of any or all of the other lots in the location fronting on Ohio Avenue in the territory above described, their heirs, executors, administrators and assigns, on a violation of the condition or restriction aforesaid, the right by proper legal proceedings to enforce the above condition, restriction and reversion. And the grantee hereof, by accepting this deed agrees to and with any or all of the owners of the other lots or parcels fronting on Ohio Avenue in the territory above described, their heirs, administrators, executors and assigns, that they or anyone or more of them may enforce by proper legal proceedings the aforesaid condition, restrictions and reversion; and the above condition and restriction shall until January 1, 1960, be considered as running with the aforesaid real estate hereby conveyed and shall be made a part of all deeds and conveyances, instruments, leases, transfers, assignments and agreements made by the said grantee, his heirs, executors, administrators or assigns, or any of them of said premises."

This agreement was subsequently filed and recorded in the Recorder's Office, Franklin County, Ohio, in Deed Record, Vol. 810, at page 643 (R. 41).

The corporate petitioner herein purchased the premises in question on or about June 29, 1945 from persons holding as mesne purchasers and successors in title from said Scofield, who was a signatory to the restrictive agreement complained of (R. 57). The Respondents are all signatories to the original aforesaid agreement as to restriction on ownership, use or occupancy or are successors in title, through mesne conveyances, to the signatories thereof (R. 57).

The original petition of Respondents (Complainants below) was filed on August 16, 1945, and the amended peti-

tion, on which this cause proceeded to final judgment and order, was filed on February 8, 1946 (R. 55).

The trial court found (R. 34), and the Court of Appeals affirmed (R. 15-23) as matters of fact and law:

> 1. That the corporate petitioner, The Monroe Avenue Church of Christ, the real party in interest herein, is a corporation, and, as such, is an artificial person without race or color, and is therefore not within the prohibitions or restrictions of the aforesaid covenant.
>
> 2. That a covenant or restriction upon the acquisition or ownership of real property other than by a member of the Caucasian race is in violation of the Rule against Restraint upon Alienation and is therefore unenforceable under the Constitution and laws of the State of Ohio, and contrary to the public policy of said State, and is not applicable to any of the Petitioners herein.
>
> 3. That the covenant or restriction upon use or occupancy by any person other than a member of the Caucasian race is valid and enforceable.

There were cross appeals in the Court of Appeals and in the Supreme Court of the State of Ohio (R. 11, 5). The Court of Appeals for Franklin County, Ohio, denied both appeals and sustained the trial court (R. 11). Petitioners here apply for the Writ of Certiorari from the final order of the Supreme Court of the State of Ohio sustaining the proposition last above stated (i. e. No. 3).

B

Questions Presented

I

Whether failure and refusal of the Supreme Court of the State of Ohio to consider and pass upon constitutional questions affecting the rights of the Petitioners, duly and

seasonably raised below, is a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, and of the Constitution and laws of the State of Ohio.

II

Whether judicial enforcement of a restriction against the use of land by Negroes constitutes a violation of the Fourteenth Amendment to the Constitution of the United States and of the Constitution and laws of the State of Ohio.

III

Whether any agreement restricting the use of land by members of racial or religious minorities is against the public policy of the United States.

All of the foregoing questions were seasonably and properly raised in the Franklin County Court of Common Pleas, in the Court of Appeals for Franklin County, and in the Supreme Court of the State of Ohio. The Court of Appeals, admitting that there is no governing statute in Ohio upon the questions presented (R. 21), rests its decision upon an analogy of doubtful authenticity (R. 21), *State, ex rel. etc.,* v. *Trustees,* 126 O. S. 290, and the Doctrine of *stare decisis,* improperly based upon decisions of other and foreign jurisdictions (R. 21-23). The Supreme Court of the State of Ohio, being the court of last resort, refused and failed to recognize that there were questions of great and grave constitutional importance and of great public concern raised and that it owed Petitioners the constitutional duty of deciding them.

C

Reasons Relied upon for the Allowance of the Writ

1. Failure and refusal of the Supreme Court of the State of Ohio to pass upon the constitutional questions raised below is violative of the Constitution and laws of the United States.

(a) "—nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Fourteenth Amendment, Constitution of the United States.

(b) The Constitution, laws and decisions of the State of Ohio are all declaratory of the right of the Petitioners herein to have an appeal as of right from the Court of Appeals to the Supreme Court where a constitutional question is involved.

"• • • "It '(the Supreme Court of the State of Ohio), shall have • • • appellate jurisdiction *in all cases* arising under the Constitution of the United States or of this State • • •" (Italics ours).

Art. IV, Sec. 2, Constitution of the State of Ohio.

"Except as to the judgment or final order of the court of appeals or a judge thereof, in cases involving questions under the Constitution of the United States or of this state,—no appeal shal be filed in the Supreme Court • • • without • • • leave • • •."

Section 12223:29—Throckmorton's Ohio Code, Anno. (1940 Baldwin's Certified Revision).

See also:

Hoffman v. *Stately*, 92 O. S. 505, 112 N. E. 1084 (1915);

Weiner v. *State*, 118 O. S. 129, 160 N. E. 623 (1928).

2. Judicial enforcement of the agreement in question is violative of the Constitution and laws of the United States.

(a) The right of a citizen to use, occupy and enjoy his property is guaranteed by the Constitution and laws of the United States.

Section 1, Fourteenth Amendment to the Constitution of the United States.

Ward v. *Maryland*, 12 Wall. 418;
The Slaughterhouse Cases, 16 Wall. 36;
Buchanan v. *Warley*, 245 U. S. 60.

(b) The deprivation by a state of any of the constitutionally guaranteed or protected rights is prohibited, whether such deprivation occurs by reason of an act of the legislature or by judicial decision or enforcement.

Ex parte Virginia, 100 U. S. 339;
Virginia v. *Rives*, 100 U. S. 313;
Chicago, B. & Q. Ry. Co. v. *Chicago*, 166 U. S. 226;
Raymond v. *Chicago Traction Co.*, 207 U. S. 20;
Buchanan v. *Warley, supra;*
Mooney v. *Holohan*, 294 U. S. 103;
American Federation of Labor v. *Swing*, 312 U. S. 321.

(c) The agrement in question, even though a private contract between private parties, being derogatory of fundamental rights, cannot exact the aid of the state judiciary to enforce its terms.

Home Bldg. & Loan Assoc. v. *Blaisdell*, 290 U. S. 398;
Norman v. *B. & O. R. R. Co.*, 294 U. S. 240;
Gandolfo v. *Hartman*, 49 Fed. 181;
Kennett v. *Chambers*, 14 How. 38.

(d) Assuming that the covenant in question is enforceable as written, the decision of the courts below to the effect that the corporate petitioner, the real party in interest herein, is a person without race or color and may own the

property but denying it the right of user to the individual petitioner, Dickerson, is a deprivation of property without due process of law.

Peoples Pleasure Park Co. v. *Rohleder,* 109 Va. 429, 61 S. E. 794;

Continental Tyre & Rubber Co., Ltd., v. *Daimler Co., Ltd.,* 1 K. B. (1915), 893.

(e) The issues raised by this application have never been decided by this Court.

Corrigan v. *Buckley,* 271 U. S. 323;

Smith v. *Allwright,* 321 U. S. 649;

Mays v. *Burgess, et al.,* — U. S. — (cert. den.) May 28, 1945 (No. 1208).

cf. Dissent in *Hurd* v. *Hodge* and *Urciolo* v. *Hodge,* Nos. 9196 and 9197, U. S. Court of Appeals for the District of Columbia, May 26, 1947.

3. Private restrictions or covenants against the use of land by racial or religious minorities are contrary to the public policy of the United States and are unenforceable.

Section 1, Fourteenth Amendment to the Constitution of the United States;

The Slaughterhouse Cases, supra;

Strauder v. *West Virginia,* 100 U. S. 303;

Tunstall v. *Brotherhood of Firemen, etc.,* 323 U. S. 210;

Steele v. *Louisville & N. R. Co.,* 323 U. S. 192;

In re Drummond Wren, 4 D. L. R. 674;

The United Nations Charter, Preamble and Articles 55 and 56;

Gandolfo v. *Hartman, supra;*

Kennett v. *Chambers, supra.*

Investigations, reports and studies of sociologists, students in race relations, city planning and prevention of crime and juvenile delinquency have all indicated that our national problems in these areas have been intensified by

the practices of persons, such as the Respondents herein, through the type of restrictive covenants against Negroes and other minority groups, such as herein complained of, which confine these groups to certain predetermined ghettos and thereby condemn them to a type of economic existence which is inimical to the welfare of the nation as a whole. The problem thus presented by the present application for a Writ of Certiorari becomes one of grave, great and immediate public concern to the Nation at large and demands the decision of this tribunal on the facts presented.

In support of the foregoing grounds of application, the petitioners submit herewith the accompanying Brief setting forth in detail the pertinent facts and arguments applicable to such Petition.

Petitioners, through their attorneys in this Court, expressly state that this application is filed in good faith and not for purposes of delay.

Conclusion

WHEREFORE, it is respectfully submitted that this Petition for a Writ of Certiorari to review the judgment of the Supreme Court of the State of Ohio be granted.

LEON A. RANSOM,
AUSTIN L. FICKLING,
Attorneys for Petitioners.

FRANK C. SHEARER,
DAVID D. WHITE,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 153

TRUSTEES OF THE MONROE AVENUE CHURCH OF CHRIST, INDIVIDUALLY AND COLLECTIVELY; THE MONROE AVENUE CHURCH OF CHRIST, A CORPORATION; AND LLOYD C. DICKERSON,

Petitioners,

VS.

FRED C. PERKINS, EARL McCULLOUGH, DRELL MURLETTE, G. P. MOHR, MILDRED MERCURIO AND MOLLEY E. VICE,

Respondents

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

Opinion of the Court Below

The opinion of the Supreme Court of the State of Ohio is unreported. It appears in the record at page 3. The opinion of the Court of Appeals of Franklin County, Ohio, is unofficially reported in 70 N. E. (2nd) 487, and also appears in the record at pp. 15-23.

Jurisdiction

The jurisdiction of the Court is invoked under Section 237 of the Judicial Code, as amended (28 U. S. Code 344 (b)).

The judgment sought to be reviewed was entered by the Supreme Court of the State of Ohio on March 5, 1947 (R. 3), and application for rehearing was denied on March 26, 1947 (R. 3).

Statement of the Case

The statement of the case, and the statement of the salient facts from the record appear in the accompanying petition for certiorari.

Errors Below Relied upon Here

I. The Supreme Court of the State of Ohio failed and refused to examine and pass upon questions of constitutional law properly raised before it.

II. The judicial branch of the state government has imposed and enforced restrictions against ownership and occupancy of property in violation of the Constitution and the laws of the United States and the State of Ohio.

III. The judicial branch of the state government, by upholding restrictions against use of property by racial minorities, has decided that covenants requiring such restrictions are not contrary to the public policy of the state and of the United States.

Summary of Argument

I. The failure and refusal of the Supreme Court of the State of Ohio to pass upon the constitutional questions raised below is violative of the Constitution and laws of the United States and of the State of Ohio.

II. Judicial enforcement of the agreement in question is violative of the Constitution and laws of the United States.

A. The right of a citizen to occupy, use and enjoy his property is guaranteed by the Constitution and laws of the United States.

B. Deprivation of the constitutional guarantee of protection of rights is prohibited, whether such deprivation occurs by reason of legislative or judicial action.

C. The judiciary is without power to enforce private contracts which are in derogation of fundamental rights.

D. Assuming, without admitting, the enforceability of the covenant in question, the decision of the courts below to the effect that corporate petitioner may not use the property as it sees fit is a taking of property without due process of law.

E. The issues here involved have not heretofore been decided by this Court.

III. Restrictions against the use or occupancy of land by members of racial minorities is contrary to the public policy of the United States.

ARGUMENT

I

The Failure and Refusal of the Supreme Court of the State of Ohio to Pass upon the Constitutional Questions Raised below Is Violative of the Constitution and Laws of the United States and of the State of Ohio.

The petitioners have a right of appeal from the decision of the Court of Appeals of Franklin County, affirming the decision of the Court of Common Pleas of Franklin County, duly filed in season and in proper form (R. 1-3). The right

to appeal from the decision of an inferior court in Ohio is unlimited where a constitutional question is involved.

> "• • • It • • • shall have • • • appellate jurisdiction in all cases arising under the Constitution of the United States or of this State • • •."
>
> Article 4, Section 2, Constitution of the State of Ohio.

It was obviously the intention of the framers of the constitution, and certainly of the codifiers of the present code operating in the State, that this appeal should lie without exception, whenever a constitution question was raised, in the trial court.

> "Except as to the judgment or final order of the Court of Appeals or a judge thereof, in cases involving questions under the Constitution of the United States or of this State,—no appeal shall be filed in the Supreme Court • • • without • • • leave • • •."
>
> Sec. 12,223-29 Throckmorton's Ohio Code, Anno. (1940 Baldwin's Certified Revision).

It is obvious from the language of both the Constitution and the statute that the Supreme Court of the State was charged with a mandate to review and pass upon any debatable constitutional question raised properly in the inferior courts. There is no question but that controversial and debatable constitutional problems were raised below. The Court of Appeals, in its decision at R. 21, says that questions here presented have not been heretofore decided by the courts of Ohio. There can be no question of such problems not having been decided by this Court. Obviously the matters are debatable.

The cases of *Hoffman* v. *Stately*, 92 O. S. 505, 112 N. E. 1084, and *Weiner* v. *State*, 118 O. S. 129, 160 N. E. 623, are declarative, by inference, that the Supreme Court of the

State of Ohio cannot escape its duty of passing upon the constitutional rights of its citizens whenever questions are properly raised.

The stipulation entered herein by Counsel below leaves no doubt as to whether questions of constitutional issues are present before the Court. Its failure to consider these questions in and of itself amounts to a denial of due process to the petitioners.

II

Judicial Enforcement of the Agreement in Question Is Violative of the Constitution and Laws of the United States

A. *The Right of a Citizen to Occupy, Use and Enjoy His Property Is Guaranteed by the Constitution and Laws of the United States.*

The corporate petitioner was and still is the owner in fee simple of the premises in question. The trial court found, and the appellate court affirmed, that petitioner, being a corporation, is a "person" without race or color and is therefore not within the prohibitions of the covenant in question. Moreover, it was found, and affirmed below, that that portion of the covenant in question which prohibits the ownership of property by a person "other than of the Caucasian race" violates the rule against restrictions upon alienation and would, for that reason, be inapplicable. The net result, therefore, of the decisions below is to hold that the Monroe Avenue Church of Christ is the legal holder of the title to the property but that it is not entitled to the use, occupancy or enjoyment thereof—all significant parts of the *dominium*.

The right of user, being the most important portion of the *dominium*, must be protected under the first section of the 14th Amendment to the Constitution of the United

States, and its necessary protection has been announced repeatedly by this Court.

See:

Ward v. *Maryland*, 12 Wall. 418;
Slaughter House Cases, 16 Wall. 36;
Buchanan v. *Warley*, 245 U. S. 60.

It is immaterial whether the privilege of user or enjoyment of property is inherent in or protected by the state or federal statutes; under either view interference therewith by the state government is prohibited by the 14th Amendment.

B. *Deprivation of the Constitutional Guarantee of Protection of Rights is prohibited, whether such deprivation occurs by reason of legislative or judicial action.*

It is hardly necessary to labor this brief with argument to the effect that action by the judiciary is as much state action as if it were had by the legislature itself. This Court has long since decided, and we believe is committed to, the proposition that judicial action, whether by way of decision, interpretation, or enforcement of laws or a private contract, is action by the state itself. Certain it is that state action, where it deprives any citizen or person of his rights without due process or equal protection of the law, must be struck down under the terms of the 14th Amendment to the Constitution.

Buchanan vs. *Warley, supra,* definitely answered the question for all time when the Court stated (245 U. S. 78, 82):

> "The concrete question here is: May the occupancy and, necessarily, the purchase and sale of property of which occupancy is an instance, be negated by the

states, or by one of its municipalities, solely because of the color of the occupant of the premises?——

"—The 14th Amendment, and this statute enacted in furtherance of the purpose, operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color.——

"We think this attempt to prevent alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing State interference with property rights except by due process of law.—"

Harmon vs. *Tyler*, 273 U. S. 668, and *Deans* vs. *Richmond*, 281 U. S. 704, have reached the same conclusion.

The Court will take judicial notice of the many cases, among them those cited above, which have held that the prohibitions of the 14th Amendment apply to judicial action as well as to legislative action. If, as this Court has stated, a state is without power to pass legislation providing for discrimination between persons affecting their property rights, when such discrimination is based upon color or race, or upon some ground not properly cognizable by the courts, then it must follow that it may not, by judicial action, accomplish a result otherwise forbidden. This Court has stated that when a State court grants an injunction against peaceful picketing on the ground that such conduct is forbidden by the comomn law of the State, its action has the same effect as if the legislature had forbidden such conduct and would therefore be in violation of the 14th Amendment. (*American Federation of Labor* vs. *Swing*, 312 U. S. 321; *Bakery Drivers Local* vs. *Wohl*, 315 U. S. 769.) Again, this Court has stated that conviction of an alleged offender of inciting a breach of peace under a

"judge made" law of the State is to be condemned exactly as if the conviction were obtained by virtue of a statute.

Cantwell vs. *Connecticut*, 310 U. S. 296.

See also: *Bridges* vs. *California*, 314 U. S. 252; and *Chicago B. & Q. Railroad Company* vs. *Chicago*, 166 U. S. 226.

It is the contention of the petitioner herein that it is of no moment whether action is initiated by the Legislature, as in *Buchanan* v. *Warley, supra*, or by private individuals, as in the instant case; it must and does rely upon the state judiciary to carry out the design to deprive persons of the use or enjoyment of property solely because of their race or color.

C. The Judiciary is without power to enforce private contracts which are in derogation of fundamental rights.

Assuming that the agreement in question is merely a private contract between private parties, entered into without governmental influence or interference, it still must depend for its enforcement upon governmental action through the judiciary. Petitioners contend that the right to the use and occupancy of the land which they have properly acquired is one that is protected by both the Constitution and laws of the United States (see *Buchanan* vs. *Warley, supra*). Any agreement on the part of individuals which would tend to interfere with this use would be in derogation of fundamental rights which are guaranteed by the Constitution and which have been specifically protected by action of the Congress of the United States. No enforcement of a covenant in derogation of these rights and of this Congressional action can, therefore, be given by a State court. Congress has protected this right by

making it a felonious conspiracy to injure or oppress petitioner in the exercise thereof. Section 51 of Title 18 of the United States Code provides:

> "If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exerecised the same—they shall be fined not more than $5,000 and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any place of honor, profit, or trust created by the Constitution or laws of the United States."

There is no doubt that a written agreement, solemnly executed, and recorded as a deed, by a group of property owners to the effect that a person shall be deprived of his constitutional right to acquire and use property solely because of his race and color, is evidence of the highest order that there has been effected, between the signatories thereto a conspiracy to deprive the person affected of a right secured to him by the Constitution and laws of the United States.

The specific question at bar has been passed upon by a Federal District Court in Arkansas. In the case of *United States* v. *Morris*, 125 Fed. 322, after showing that by virtue of the Thirteenth Amendment, Congress had the power to enact this legislation regarding the acts of individuals, the court proceeded to discuss the validity of an indictment of certain defendants who had conspired to keep Negroes from the right to lease and cultivate private lands. In an elaborate and scholarly review of the history of the Act, the court came to the conclusion that a mere agreement to keep Negroes out of lands was the very type of act prohibited by the legislation, and concluded:

> "That the rights to lease lands—are fundamental rights inherent in every citizen, is indisputable; and a

> conspiracy by two or more persons to prevent Negro citizens from exercising these rights because they are Negroes is a conspiracy to deprive them of a privilege secured to them by the Constitution and the laws of the United States, within the meaning of Section 5508, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3712)" (at 331)

From this argument only one conclusion can be deduced —the covenant in question constitutes a conspiracy to violate the laws and the Constitution of the United States. May a court, acting as an arm of the federal government, lend its aid to the enforcement of a criminal agreement to deprive a citizen of one of his privileges or immunities of citizenship? Only one answer can be given to this question, and this Court has unmistakably given that answer, when, speaking through Chief Justice Taney in *Kennett, et al.*, v. *Chambers*, 14 How. 38, it said:

> "The question is—whether such a contract, made at that time, within the United States, for the purposes stated in the contract and the bill of complaint, was a legal and valid contract, and such to entitle either party to the aid of the courts of justice of the United States to enforce its execution—."
>
> "for as the sovereignty resides in the people, every citizen is a portion of it, and is himself personally bound by the laws which the representatives of the sovereighty may pass—within the scope of their delegated authority—. It is his own personal compact as a portion of the sovereignty in whose behalf it is made. And he can do no act, nor enter into any agreement to promote or encourage revolt or hostilities against the territories of a country with which our government is pledged by treaty to be at peace, without the breach of his duty as a citizen, and the breach of the faith pledged to the foreign nation. *And if he does so he cannot claim the aid of a court of justice to enforce it;—our own freedom cannot be preserved without obedience to our own laws, nor social order preserved if the judicial*

branch of the government countenanced and sustained contracts made in violation of the duties which the law imposes—.'' (at 49, 50) (Italics added)

The position here taken by Chief Justice Taney has never been questioned. In fact, it cannot be questioned except by revolution. The signatories to the covenant at bar are likewise parties to Article IV, and Amendments V and XIV of the Constitution and to Sections 41, 42, Title 8, United States Code and Section 51, Title 18, United States Code. They obviously contradict each other and cannot stand together. The lesser in dignity, the private agreement, must yield to the paramount authority of their public compact. Any other conclusion is to say that not only will this Court permit respondents to deny their solemn adherence to the Constitution and laws of the United States, but at the same time give their criminal agreement in violation thereof the sanction of a rule of property.

Speculation is unnecessary. The courts of the United States have already spoken on the matter. It has been unanimously held that conspiracies such as here involved cannot be enforced through the medium of the very agencies designed to protect citizens in their privileges and immunities. The leading case is *Gandolfo* v. *Hartman*, 49 Fed. 181. There the court held that a covenant restricting *the lease of property to others than those of the Chinese race was:*

> "* * * contrary to public policy of the government, in violation of a principle, embodied in its constitution. *Such a contract is absolutely void and should not be enforced in any court—certainly not in a court of equity of the United States.* (Italics added)

The principle announced there has been consistently adhered to. Federal courts have repeatedly refused to enforce contracts which embody provisions violative of our Constitution or laws. See: *Fox* v. *Gardner*, 21 Wall. 475; *The*

Spartan, 25 Fed. 44; *Ex Parte Reeves*, 121 Fed. 848; *The Fri*, 154 Fed. 333; *Grossman* v. *Union Trust Co.*, 228 Fed. 610; *Lakos* v. *Saliaris*, 116 Fed. (2d) 440. State courts have taken similar views of the problem. See: *Lee* v. *Boise Development Co.*, 21 Idaho 461, 122 Pac. 851; *Porter et al.*, v. *Barrett et al.*, 233 Mich. 373, 206 N.W. 532, L.R.A. 1916B, 1208, 1209; 9 A.L.R. 120, *et seq.* The rules of the common law are too well known to require any citations. Individuals never have had the right of absolute freedom of contract in the sense that judicial recognition and enforcement of their private agreements may be had when such agreements run counter to the general welfare and the public policy of the sovereign. Usurious, gambling, immoral contracts are all illustrative of the principle that the courts will not lend their aid to the enforcement of such agreements.

D. *Assuming, Without Admitting, the Enforceability of the Covenant in Question, the Decision of the Courts Below to the Effect that Corporate Petitioner May Not Use the Property as It Sees Fit, Is a Taking of Property Without Due Process of Law.*

Assuming, without conceding, that the covenant in question is enforceable, the courts below have taken an untenable position. Having first found that the corporate petitioner has a right to the ownership of the property, that it is without color or race, and therefore not within the prohibitions of the restrictive covenant, it next finds that the corporation is denied the use of its property for corporate purposes because the person placed therein is "part negro (Sic)." The court fails to pass upon the question of whether the occupant, Petitioner Dickerson, who is admittedly a minister of the Gospel employed by the corporate petitioner, is a servant, agent, or employee of the corporation. If he be such a servant, then the covenant itself, by its express terms,

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permits his occupancy of the premises. The courts below, by their findings, have inferentially ruled that the corporation, a person without color, can own and occupy the premises for corporate purposes but that they cannot do so if that occupancy be by a servant other than "Caucasian." This holding contradicts the provisions of the covenant.

More important, the courts below have said, as pointed out above, that the corporation may own but may not enjoy the property. Ownership without use is of no value.

E. *The Issues Here Involved Have Not Heretofore Been Decided by This Court.*

It has frequently been assumed that racial restrictive covenants are enforceable as a result of the decision of this Court in the case of *Corrigan* v. *Buckley* (55 Appeals D. C. 30; 299 Fed. 899; App. den. 271 U. S. 323). A re-examination of what was said in that case makes it apparent that the problems now present here were then neither present nor decided.

In that case, about 30 white persons, including the plaintiff and defendant Corrigan, who were the owners of 25 parcels of land, executed and recorded an indenture in which they mutually covenanted that no part of the properties covered would ever be sold to or occupied by Negroes. A year later, defendant Corrigan entered into a contract to sell to defendant Curtis, a Negro, a house and lot situated within the restricted area. Plaintiff thereupon brought suit to enjoin the sale to and occupancy by defendant Curtis. Both defendants moved to dismiss the bill upon grounds which did not question the constitutional propriety of judicial enforcement of the covenant. The motions were denied and an appeal to the Court of Appeals for the Dis-

trict of Columbia taken, where the issue was stated as follows:

> "• • • The sole issue is the power of a number of landowners to execute and record a covenant running with the land, by which they bind themselves, their heirs and assigns, during a period of 21 years, to prevent any of the land described in the covenant from being sold, leased to, or occupied by Negroes."

Following an affirmance of the decree, an appeal to this Court was taken under the provisions of Section 250 of the Judicial Code. This Court stated the issue as follows:

> "Under the pleadings in the present case the only constitutional question involved was that arising under the assertions in the motions to dismiss that the indenture or covenant which is the basis of the bill is 'void' in that it is contrary to and forbidden by the 5th, 13th and 14th Amendments. • • •"

In dismissing the appeal for want of jurisdiction, this Court said:

> "And, while it was further urged in this Court that the decrees below in themselves deprived the defendants of their liberty and property without due process of law, in violation of the 5th and 14th Amendments, this contention likewise cannot serve as a jurisdictional basis for the appeal. Assuming that such a contention, if of a substantial character, might have constituted ground for an appeal under paragraph 3 of the Code provision, it *was not raised* by the petition for the appeal or by any assignment of error, either in the Court of Appeals or in this Court; and it is likewise lacking in substance. • • •
>
> "Hence, without a consideration of these questions, the appeal must be, and is, dismissed for want of jurisdiction." (Italics supplied.)

It must be concluded, therefore, that the constitutionality of judicial enforcement of such an agreement was not decided in *Corrigan* v. *Buckley*.

While the *Corrigan* decision contains an intimation by way of dictum that no constitutional question is presented by the facts of that case, it is to be remembered that this Court was not then committed to the doctrine that common law determinations of courts can constitute reviewable violations of the due process clause. But the Court is now committed to that doctrine.

The Court has additional reason for reinterpreting its decision in the *Corrigan* case.

> "In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to re-examine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day. *This is particularly true when the decision believed erroneous is the application of a constitutional principle* rather than an interpretation of the Constitution to extract the principle itself." (Emphasis supplied.)

III

Restrictions Against the Use or Occupancy of Land by Members of Racial Minorities Is Contrary to the Public Policy of the United States.

It is not amiss at this time to call the Court's attention to the fact that enforcement of private contracts which are designed for, and tend toward restriction upon the use of property by persons of minority races, is violative of the principles publicly announced and specifically adhered to by this country in its subscription to the United Nations

charter, Articles 55, 56, and to the Preamble of that charter which says:

> "We, the people of the United Nations, determined to save succeeding generations from the scourge of war, • • • and reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of man and woman and of nations large and small • • • and for these ends to practice tolerance and live together in peace with one another as good neighbors • • •"

The above quoted noble sentiment is no more than a fulfillment of the doctrines of Jefferson and the other forefathers of our nation. It was never believed by them that our government would lend itself to the enforcement of racial discriminatory practices which would set our peoples one against another.

This Court needs no reminder, and will take judicial notice, of the fact that housing conditions are the prime source of many of the evils that confront us today. Juvenile delinquency, race riots, and our present low standards of health and sanitation, are all largely due to the fact that minority peoples are herded into ghettos, not by reason of state legislation but by reason of private contracts such as this, which are judicially enforced. When the government lends its judicial arm to this type of action it becomes *particeps criminis* and must share the blame for the evils that result with those that set them in motion.

Conclusion

It is respectfully submitted that this problem is one of great and serious concern. It affects a large segment of the population of this [illegible]on which is illy housed and which has no recourse against the acts of individuals save a pronouncement of this court to the effect that the judicial en-

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forcement of such restrictive covenants, designed to operate against minority groups, is violative of the Constitution of the United States and cannot be sustained.

In view of the seriousness of the problem and necessity for a determination of this question by the highest tribunal in this land, it is respectfully prayed that a writ of certiorari may issue as requested in the accompanying petition.

Respectfully submitted,

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